Supreme Court, U.S.
FILED
OCT 21 1992
OFFICE OF THE CLERK

No. 91-1328

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE CITY OF CHICAGO, et al.,
Petitioners
v.
ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

In response to this Court's invitation, the Solicitor General recently filed a brief in this case expressing the views of the United States. The sole purpose of this supplemental brief is to respond to the Solicitor General's novel suggestion that the views of the United States Environmental Protection Agency (EPA) contained in the government's brief provide a reason to grant the petition, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the views expressed by EPA.[1]

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[1] This supplemental brief is filed pursuant to Rule 15.7 of the Rules of this Court permitting a party to file a supplemental brief in response to an "intervening matter not available at the time of the

1. There is no merit to the Solicitor General's suggestion that the case should now be remanded for further proceedings in the court of appeals. Such a disposition is typically warranted where, unlike this case, there has been an intervening decision of this Court bearing on the issues raised by the petition pending before the Court.[2] Less typical, and still readily distinguishable from the circumstances of this case, are those occasions when the Court grants, vacates, and remands a petition when the party that prevailed in the lower court effectively confesses error or otherwise fundamentally changes its position before the Court in response to the petition.[3] Finally, this is not a circumstance where there has been an intervening change in the law at issue in the case. This case concerns the meaning of a federal statute, not the meaning of federal regulations,[4] and Congress has not amended the statutory provision at issue.[5]

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party's last filing."

[2] See generally Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L. Q. 5 (1983).

[3] See, *e.g.*, *Federal Labor Relations Authority v. Department of Agriculture*, 488 U.S. 1025 (1988) (intervening change in Department of Agriculture Regulations); *Petty v. United States*, 481 U.S. 1034 (1987) (confession of error).

[4] Compare *Burns v. Hein*, 419 U.S. 989 (1974) (grant, vacate, and remand in light of intervening clarification of Department of Agriculture regulations where question presented was whether challenged state regulations were consistent with federal regulations).

[5] Compare *Immigration and Naturalization Service v. National Center for Immigrants' Rights*, 481 U.S. 1009 (1987) (remand based on intervening federal legislation).

The Solicitor General relies on three cases in support of his claim that a remand is nonetheless warranted. See U.S. Br. 13, citing *Holland v. First Virginia Banks, Inc.*, 112 S.Ct. 1152 (1992); *Oberly v. Baltimore & O. R.R.*, 479 U.S. 980 (1986); *State Tax Comm'n v. Herzog Bros. Trucking, Inc.*, 487 U.S. 1212 (1988). None supports that claim.

a. In *Holland v. First Virginia Banks, Inc.*, 112 S.Ct. 1152 (1992), a remand was warranted because there had been an intervening change in the federal statutory program at issue, with congressional enactment of the Civil Rights Act of 1991. As the Solicitor General acknowledges (U.S. Br. 11 n.6), Congress has not similarly amended the Resource Conservation and Recovery Act, which is the statute here at issue.

b. In *Oberly v. Baltimore & O. R.R.*, 479 U.S. 980 (1986), a remand was appropriate because the court of appeals had relied in its initial ruling on an amicus brief filed by the Environmental Protection Agency that the United States Department of Justice had not authorized or approved, and which the United States subsequently disavowed in a brief filed with this Court. See *Baltimore & O.R.R.*, 837 F.2d 108, 110 (3rd Cir. 1988). Here, by contrast, the lower court ruling was not tainted by its mistaken reliance on EPA's view.

To be sure, as described in the Solicitor General's brief, the EPA Administrator has changed his view on the meaning of Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921(i), which is the provision here at issue. But such an intervening development does not warrant a remand to the court of appeals for reconsideration of its prior ruling. Unlike in *Oberly*, there is no reason to believe

that the court of appeals is "likely" (U.S. Br. 17) to change its ruling in response to the EPA memorandum appended to the Solicitor General's brief.

The Seventh Circuit concluded that municipal incinerator ash is a hazardous waste subject to the requirements of Subchapter C of RCRA based on the "statute's plain language." Pet. App. 16a. The court rejected legislative history suggesting a contrary result because it would lead to an "absurd" reading of the law. *Id.* The court further concluded that the "see-sawing statements from the EPA" and the agency's "waffling" regarding the issue "deserve no weight at all." *Id.* at 12a. That EPA has flip-flopped is hardly likely to prompt the court of appeals now to give the agency deference, particularly when the agency's newly-discovered view is the very one that the court dubbed too "absurd" to overcome the plain meaning of the statutory language. *Id.* at 16a.

Nor should the Seventh Circuit do otherwise. Contrary to the Solicitor General's claim (U.S. Br. 11), EPA has not simply "clarif[ied]" its earlier views. EPA has adopted a construction of Section 3001(i) totally at odds with its prior authoritative reading of that provision. It is well settled that "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 2535 (1991); see *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). And, in no event can an agency interpretation overcome the plain meaning of the statutory language. See, *e.g.*, *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S.Ct. 2759, 2770 (1990).

c. Finally, this Court's remand in *State Tax Comm'n v. Herzog Bros. Trucking, Inc.*, 487 U.S. 1212 (1988), likewise provides no support for remand. Indeed, *Herzog Bros.* underscores the impropriety of such a disposition in the circumstances of this case. In *Herzog Bros.*, the question presented was whether the Federal Indian Trader Law preempted certain state tax laws. In its initial opinion, the New York Court of Appeals had held that the federal law preempted the state tax. See *Herzog Bros. Trucking, Inc. v. State Tax Com'n*, 69 N.Y.2d 536, 508 N.E.2d 914 (1987). As the Solicitor General explains, this Court remanded for the state court's reconsideration in light of subsequently-proposed state tax regulations.

But what the Solicitor General declines to note is that the state court, on remand, adhered to its earlier position. See *Herzog Bros. Trucking, Inc. v. State Tax Com'n*, 72 N.Y.2d 720, 533 N.E. 2d 255 (1988). The state court found unpersuasive the Solicitor General's suggestion in its brief before this Court that the state court might have read the preemptive scope of federal law too broadly, tersely concluding that "the cases relied upon by the Solicitor General were fully considered by us in our earlier opinion." 72 N.Y.2d at 724; 533 N.E.2d at 257. And, the court declined altogether to consider the validity of the new state tax regulations on the ground that "a decision on their validity upon the present record would constitute an advisory opinion involving hypothetical future transactions of unknown parties." 72 N.Y.2d at 725; 533 N.E.2d at 258.

Perhaps a remand was nonetheless appropriate in *Herzog* because in that case, unlike this case, the petition did not otherwise present a legal issue warranting this Court's plenary review. But, here, where the petition

plainly does present such an issue, there is no comparable reason to require the parties to engage in an equally valueless lower court proceeding.

2. There is, moreover, yet another reason to reject the Solicitor General's suggested disposition. This Court has made clear that the principle of judicial deference to agency interpretation of statutory language does not apply "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Id.* at 213.

The Solicitor General's appending of the EPA memorandum to its brief (see U.S. Br. 1a-11a) is a thinly disguised effort to avoid the Court's precedent in this area for the illegitimate purpose of claiming judicial deference to which EPA would in no event be entitled. The reason for the sudden appearance of the EPA memorandum, just before the filing of the Solicitor General's brief is obvious, notwithstanding that memorandum's careful avoidance of any reference to this pending litigation. The memorandum seeks to fabricate the appearance of the kind of agency interpretation to which this Court would provide deference under *Chevron v. Natural Resources Defense Council, Inc.*,, 467 U.S. 837 (1984).

At the end of the day, however, the agency's belated views on the issue in this case are entitled to the same level of deference that they would have absent such pre-filing machinations: none at all. The reasons for not giving deference to mere agency litigating positions do not disappear by removing the agency's

views from the text of the brief, placing them instead in a "memorandum" appended to the brief, and mailing that memorandum to regional agency offices a few days before the brief's filing. "Since such a [contrivance] can be formulated in practically every case," any other result would "amount[] to a test of whether the [Department of Justice] has a stupid staff. * * * [*Chevron*] requires courts to do more than insist upon artful * * * characterizations." *Cf. Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2898 n.12 (1992).

3. Both before and after the filing of the Solicitor General's brief, EPA has spoken to the legal issue raised in the case only once in a manner entitled to judicial deference under *Chevron*. In July 1985, EPA concluded that Section 3001(i) does not "exempt the regulation of incinerator ash from the burning of nonhazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste." 50 Fed. Reg. 28725-28726 (1985). That was the agency's authoritative view of the new statutory requirements, formulated contemporaneously to the law's passage, based on the statute's language, "legislative history and EPA's views of Congressional purposes for the new requirements." *Id.* at 28703.

By contrast, the EPA's subsequent abandonment of that position in the context of this litigation lacks any of the indicia justifying judicial deference. In no event, therefore, does it provide a sound basis for asking the court of appeals to reconsider its prior ruling.

CONCLUSION

The petition for a writ of certiorari should be granted.[6]

Respectfully submitted.

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October 1992

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[6] Petitioners have advised us that they, too, plan on filing a supplemental brief that argues against the Solicitor General's suggestion that a remand is warranted.